

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION NO. 27211 OF 2006

For Approval and Signature:

HONOURABLE MR. JUSTICE K.M. MEHTA

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
?

BHARATIBEN RAKESHBHAI DAMIR D/O DHARAMPAL
MALHOTRA & 1 – Petitioners
versus
RAKESH AMARSINGH DAMIR - Respondent

Appearance:
party-in-person FOR for petitioner
MR NEHUL L DAVE for respondent

CORAM: HONOURABLE MR. JUSTICE KAMAL M. MEHTA

Date : 15.3.2007

ORAL JUDGMENT

1. Mrs. Bhartiben Rakeshbhai Damir and Mr. Rupal
Dharampal Malhotra – petitioners have filed this
petition under Article 227 of the Constitution of
India, with a prayer that this Court may issue a writ

of certiorari quashing and setting aside the order dated 20th Nov.2006 to the extent of imposing condition to pay 25% of the principal amount i.e. Rs.3,10,000/- to the respondent for restoration of the suit.

2. The petition was filed on 21st Dec.2006. This Court has passed orders on 27th Dec.2006, 9th Jan.2007 and 8th March 2007. On behalf of respondent, Mr.Nehul Dave, learned advocate appeared.

3. With the consent of the parties, this matter is taken up for final disposal.

4. The brief facts of the present case are as under:

4.1 The marriage between the petitioner Bhartiben and the respondent Rakesh Damir was solemnised as per Hindu rites on 7th Nov.1995. Out of the said wedlock, the petitioner gave birth to one son, Dhruvesh on 31.3.1997. After the marriage, the parties lived together for some time, but it appears that from October 2002, the husband has driven away the wife from her matrimonial home and from on that day

onwards, she is staying with her parents.

4.2 It is the case of the petitioner that due to illness of petitioner's father, she used to receive certain amounts from her husband from time to time. When they were living together, the wife had also given a cheque book to the husband on the trust and confidence that the husband will use the same for bonafide purpose. However, it appears that as the wife has taken the amounts from her husband for the purpose of treatment of the illness of her father, the husband submitted a cheque for Rs.3,10,000/- given by the wife on 14.10.2002 which was bounced. In view of this, the husband filed Summary Suit No.2413 of 2004 against the wife claiming Rs.3,10,000/-. It appears that in that suit, the husband has taken out Summons for Judgment and the petitioner filed application seeking time to file reply thereto. It appears that the wife was unable to defend the said suit and ultimately, the learned Chamber Judge has passed the decree of Rs.3,10,000/- on 3rd Feb.2006 directing the wife to pay the same with interest 18% per annum.

4.3 It appears that the wife has thereafter filed application being Misc.Civil Application No. 497 of 2000 for quashing and setting aside the decree which was obtained by the husband against the wife on 3rd Feb.2006.

4.4 The learned Judge heard the said application filed under Order 37 Rule 4 of the Code of Civil Procedure on condition that the petitioner pays 25% of the principal amount, i.e. Rs.3,10,000/- to the husband within one month.

5. Heard Ms.Bhartiben Damir, the party-in-person and Mr.Nehul Dave, learned advocate for the respondent. Ms.Bhartiben has stated that if the entire modality of the suit is seen, the husband claiming Rs.3,10,000/- with interest @ 18% per annum against the amount for which the wife has signed the cheque when the relationship between them was cordial, the said cheque was misused and it came to be dishonoured and she was not in a position to pay the amount. However, ultimately, the learned Judge has passed the decree against the wife and according to her, she has to

maintain herself and to maintain her son and therefore, she could not defend the case and ultimately the trial Court passed the decree in favour of the husband restoring the application on condition that the applicants to pay 25% of the principal amount to the husband within one month. On the other hand, learned advocate appearing for the respondent husband supported the judgment and decree passed by the trial Court.

6. I have gone through the record of the case and considered the facts and circumstances of the case. From the record of the case, it appears that the suit filed by the husband, there is no proper basis in this behalf as the wife had given the cheque to the husband when their relationship was good and that the cheque would be used for some useful purpose. The action of the husband is neither reasonable nor bonafide in this behalf. It is mere abuse of process of law by filling up the cheque got from the wife which came to be dishonoured and filing of the proceedings. Therefore, the whole foundation or the basis of the suit is clearly unjustifiable and unwarranted and this fact

has not been considered by the learned Judge when he dealt with the application Exh.5 for setting aside the ex-parte decree. The learned Judge ought to have appreciated that the wife was alone with her son, who is now aged about 10 years. Further, the wife is not having any work to earn any livelihood whereas the husband is a Lecturer in a College who is well settled and the amount of Rs.3,10,000/- is a big amount for the petitioner wife to pay to the husband immediately. In my view, the learned Judge has grossly erred while allowing the application for restoration on condition to pay 25% of the amount i.e. Rs.3,10,000/- to the husband which is too harsh and the said order requires to be quashed and set aside.

7. In view of the above, the judgment and decree passed by the learned City Civil Judge, Ahmedabad dated 20th Nov.2006 in Misc.Civil Application No. 497 of 2006 filed under Order 37 Rule 4 of Civil Procedure Code is quashed and set aside and the learned trial Judge is requested to hear and dispose of the application as well as the suit in accordance with law by 31st July 2007. This Special Civil Application is

allowed to the aforesaid extent and the Rule is made absolute accordingly. No order as to costs.

Sreeram.

(K.M.Mehta, J.)